

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S REPLY
BRIEF**

77-5013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

11/25

-----X
In the Matter of

Docket No. 77-5013

THE BOHACK CORPORATION,

Debtor.

B
P/S

-----X
THE BOHACK CORPORATION,

Plaintiff,

-against-

TRUCK DRIVERS LOCAL UNION NO. 807,
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, et al.,

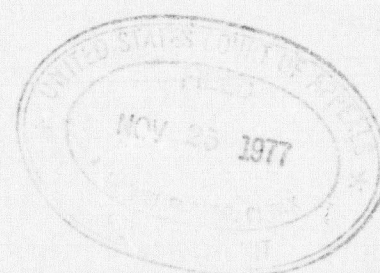
Defendants.
-----X

REPLY BRIEF OF THE BOHACK CORPORATION

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AMENDED PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of New York, (Mishler, J.) dated April 21, 1977, affirming in part and reversing in part two orders of Bankruptcy Judge Parente, dated May 28, 1976 and October 21, 1976 which resulted from hearings directed by the Second Circuit Court of Appeals on August 9, 1976. Appellant, Local 807 (hereinafter referred to as "807") appeals from the affirmance of the order of Judge Parente dated May 28, 1976 which granted the application of The Bohack Corporation (hereinafter referred to as "Bohack") made July 28, 1975, to reject the collective bargaining agreement which had previously existed between Bohack and 807, but which had expired by its own terms on March 31, 1976, two and one half months prior to the order granting the application of the debtor to reject the contract.

Both parties appeal in part from the affirmance in part and reversal in part of the order of Judge Parente,

dated October 21, 1976, directing arbitration of certain issues by Bohack and 807. That order was signed upon Bohack's motion for reargument of the hearing on arbitration directed by the Second Circuit Court of Appeals.

In its remand of August 9, 1977, the Second Circuit remanded three specific issues for determination by Judge Parente:

"(1) Whether to affirm the contract or whether the debtor has so conformed to the contract as to make it binding. See *In Re Public Ledger, Inc.*, 161 F. 2d 762, 767 (3rd Cir. 1947), cited with approval in *REA Express, Inc.*, supra, 523 F. 2d at 170; (2) whether to grant the debtor's petition to reject the agreement as onerous, adhering to our admonition in *Kevin Steel* to "move cautiously in allowing rejection of a collective bargaining agreement, ' 519 F.2d at 707; and (3) whether to order arbitration under its terms in any event, and on what issues."

The remand resulted in an order of October 15, 1976 directing "arbitration in accordance with the procedure set forth in Section 26 of the Bankruptcy Act to determine if [Bohack] breached said collective bargaining agreement, and to render a finding on damages if necessary".

In adhering to his prior decision granting arbitration, Judge Parente signed the October 21st order limiting and directing arbitration as to the following specific issues:

(a) The extent of damages that could be recovered by discharged employees upon the rejection of the agreement;

(b) The amount of extent of pension, health, insurance, welfare, vacation benefits and the values of seniority of each employee affected by said rejection;

(c) Mitigation of damages by reason of the subsequent employment of each employee of 807, or receipt of unemployment insurance by said employee;

(d) Whether or not there should be specific enforcement of the rejected agreement by reinstatement of the employees.

The October 21st order further provided that all the issues were subject to the further order of the Bankruptcy Court as to the status, amount and validity of the arbitrators' awards, and that the arbitrator shall proceed in accordance with the procedure set forth in Section 26 of the Bankruptcy Act.

Both Bohack and 807 appealed from the orders of 15, 1976; and the superceding order of October 21, 1976 to the District Court, Chief Justice Mishler, presiding, Bohack appealing on the grounds that there should be no arbitration at all if, in fact, the rejection was appropriate. It is our position that the order of October 15, 1976 was rendered a nullity inasmuch as the October 21st order was the result of reargument of the application which caused entry of the October 15th order.

On November 19, 1976, Judge Parente amended the arbitration orders and provided for a stay of arbitration pending this appeal on request of 807, which was agreed to by Bohack.

In his memorandum of decision dated April 21, 1977, Chief Justice Mishler, after an extensive review of the history of this matter found that:

" the filing of the Chapter XI petition was an anticipatory breach of the collective bargaining agreement, although the union could not assert the breach against the debtor-in-possession. 6 Collier on Bankruptcy, ¶3.23, at 576-78 (14 ed. 1972). Once the contract is rejected, the anticipatory breach could never be 'cured', and the question of violations of the labor contract following the filing of the petition became academic. The only issue left by the rejection is damages, as mitigated by the conduct of the parties following the Chapter XI petition.

In sum, the order of the bankruptcy court allowing rejection is affirmed. The October 21 arbitration order is affirmed insofar as it directs arbitration on the three issues involving

damages resulting from the rejection.

Otherwise, the order of October 21 is reversed, with directions to proceed in accordance with this opinion as to procedures for arbitration and review of any arbitration award. The order of October 15 is reversed and vacated."

Thereafter, based on the above decision of Judge Mishler on May 10, 1977, 807 filed its Notice of Appeal with this court, requesting that this court review:

- 1) The affirmance of the order of Judge Parente, dated May 28, 1976, which order granted Bohack's application to reject the executory labor agreement with 80/ as of July 19, 1975.

- 2) The order of Judge Parente, dated October 15, 1976 which was reversed and vacated by the District Court.

- 3) That portion of the order of Judge Parente dated October 21, 1976, which was reversed by the District Court and which order directed arbitration of "d) the issue of whether or not the contract rejected by the employer

should be specifically enforced by the reinstatement of each employee notwithstanding the fact that the contract has expired."

4. Whether to direct the Bankruptcy Court to determine the appropriate committee to hear arbitration if the debtor disagrees that the New York City Joint Local Committee should hear Local 807's grievances.

The debtor, on May 18, 1977, cross-appealed and requested that this court review that part of the order of Judge Mishler:

1. which reversed and vacated that part of the order of Judge Parente, dated October 21, 1976, which ordered that all issues on damages, as a result of Bohack's rejection of the executory labor agreement, to be determined by arbitrators, be subject to the further order of the Bankruptcy Court as to the status, amount and validity of the arbitrators award; and

2. which reversed and vacated that part of the order of Judge Parente, dated October 21, 1976, which order

that the arbitrator(s) proceed in accordance with the procedures set forth in Section 26, 11 U.S.C. Section 49.

POINT I

THE FACTS SUPPORTING THE BANKRUPTCY COURT'S
REJECTION OF THE EXECUTORY LABOR AGREEMENT
IS NOT SUBJECT TO REARGUMENT.

In its opening attack on Bohack's reply brief, 807 again attempts to force this court to focus on the facts and undisputed testimony that was before the Bankruptcy Court when he granted Bohack's application to reject its labor agreement with 807; and the District Court Judge when he affirmed the rejection.

Since the Bankruptcy Court's finding was found by the District Court, not to be clearly erroneous as a matter of law, it is respectfully submitted those findings of fact as reflected and reaffirmed in the decision of the District Court cannot be overturned. United States v. United States Gypsum Co. 33 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948); Becker v. Seaboard Finance Co., 436 F.2d 778 (9th Cir., 1970); Kolesinski v. Mashey, 127 F. 2d 528 (2d Cir., 1942) Morris Plan Industrial Bank v. Henderson, 131 F.2d 975 (2d Cir., 1942); In re Ira & Co., 289

F. Supp. 966 (S.D.N.Y. 1968); In the Matter of Scientific Resources Corporation, I. Bankr. Ct. Dec. 689 (E.D. Pa., 1975); Designers Guild Local 30 v. Hers Apparel Industries, Inc. I. Bank. Ct. Dec. 753 (S.D.N.Y., 1975); Bankruptcy Act, Section 2a(10) (11 U.S.C. 11); Bankruptcy Rule 810; 2A Collier on Bankruptcy, 14th ed. ¶39.28; 13 Collier, supra at ¶810.01 et seq., The Bohack Corporation v. Truck Drivers Union Local 807, 431 F. Supp. 646 (E.D.N.Y. 1977)

POINT II

THE DUTY TO ARBITRATE IS MOOT BECAUSE
THE LABOR AGREEMENT WAS REJECTED.

As more fully indicated in our main brief, once the labor agreement was rejected, the requirement to arbitrate was moot. Thus, any claim for damages or any administration claims would be subject to the Bankruptcy Court's jurisdiction pursuant to Section 64 of the Bankruptcy Act (11 U.S.C. 104).

807 puts great weight on the fact that Bohack did not expressly appeal from the District Court's affirmance of the Bankruptcy Court's order to arbitrate as proof that the duty to arbitrate still survived. It is respectfully submitted that this inference is misplaced.

It is the position of Bohack that the duty to arbitrate was mooted because the labor agreement was rejected and because 807 filed an administration claim for damages. On reargument of the arbitration order, counsel for 807 admitted that a proper rejection effectively determined the status of the administrative claim filed

by his client based on the rejection of the labor agreement.

As counsel for 807 has indicated, and as indicated in our main brief, this court stated in footnote 15 of its decision of Truck Drivers Local Union 807 v. Bohack Corp., 541 F.2d 312 (2d Cir., 1976) that: "the priority and status of any arbitration award would be a matter of bankruptcy law for the bankruptcy court to decide". Id. at 320.

Contrary to the assertions in 807's reply brief, the direction to arbitrate does not prevent or estop the Bankruptcy Court from continuing to exercise its jurisdiction to review the status, amount and validity of any award. Local Union 807, supra; In re Muskegon Motor Specialties Company, 313 F.2d 841 (6th Cir., 1963); Johnson v. England, 356 F.2d 44 (9th Cir., 1966).

It is on this point also that Bohack believes that the District Court erred. The District Court indicated in its decision that it considered the factor of whether arbitration would preserve labor peace as being pivotal in holding that the Bankruptcy Court could not review the arbitrator's award. (tr. at 136a-146a). The

District Court also felt that since this court, in its remand decision, only indicated that the Bankruptcy Court could review the priority and status of any award, that to allow the Bankruptcy Court to review the amount and validity of any award was beyond its jurisdiction (tr. at 140a).

It is respectfully submitted that it is the position of Bohack that the dicta contained in footnotes 15 and 16 was merely a general guide for the Bankruptcy Court to follow and did not constitute a rigid set of parameters upon which the Bankruptcy Court could venture. Local 807, supra at 321. Moreover, the opinion was written at a time that this Court was unaware that the contract had already been rejected. It was, therefore, proper for the Bankruptcy Court to review not only the priority and status of the award, if any, but also the amount and

validity of such award.

It is further submitted that the reversal by the District Court of the Bankruptcy Court's order authorizing arbitration to proceed pursuant to Section 26 of the Bankruptcy Act (11 U.S.C. 49) and Bankruptcy Rule 919 (b) also constituted error on its part.

The ground for the belief by Bohack that the District Court committed error in reversing the Bankruptcy Court on this point is that the District Court failed to follow the plain wording of this court in its remand. The key language in this court's remand decision "there must be judicial control over the exercise of the rights to arbitrate". Truck Drivers Local 807, supra at 320.

It is, therefore, clear that this court implicitly indicated that if and when arbitration was to proceed, it would be conducted pursuant to the Bankruptcy Act and Rules and under the full review of the Bankruptcy Court.

CONCLUSION

That portion of the District Court's order of May 19, 1976 rejecting the collective bargaining agreement be affirmed. That portion that affirmed the order of October 21, 1976 granting arbitration of action limited issued be reversed. Failing reversal, arbitration should be had pursuant to the direction of the Bankruptcy Court and under Bankruptcy Act Rule 919(b).

Respectfully submitted,

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STATE OF NEW YORK)
 ss.:
COUNTY OF NEW YORK)

Lightbourne Daley, being duly sworn, deposes and
says:

I am not a party to this action; I am over 18 years
of age; I reside at 880 Colgate Avenue, Bronx, New York.

On November 23, 1977 I served the within Brief of
The Bohack Corporation upon O'Connor, Quinlan and Mangan,
Attorneys for defendants-appellants-appellees in this
action at 29-27 41st Avenue, Long Island City, New York
11101, the address designated by said attorneys for that
purpose by depositing a true copy of same enclosed in a
postpaid, properly addressed wrapper, in an official
depository under the exclusive care and custody of United
States Postal Service within the State of New York.

Lightbourne Daley
LIGHTBOURNE DALEY

Sworn to before me this
23rd day of November, 1977.

William M. Rickin
WILLIAM M. RICKIN
Notary Public, State of New York
No. 60-4624823
Qualified in Westchester County
Term Expires March 30, 1978